85-1497

No.

Supreme Court, U.S.
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MAR 8 1986
JOSEPH P. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DONALD EDWARD FLYNN,

Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petition for Writ of Certiorari

DONALD EDWARD FLYNN
Petitioner in Propria Persona
5410 Orchard
Dearborn, Michigan 48126
(313) 582-8957

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Tax Court erred and abused its discretion when it failed to look to Petitioner's 1040 Tax Return which was admitted into evidence; and if the signature of taxpayer under penalty of perjury constituted valid testimony pursuant to Rule 803(6) of Federal Rules of Evidence and Rule 143(a) of Rules of Practice of the United States Tax Court, constitutes prima facia evidence and a violation of the Court to fulfill the "due process" guarantees of the Fifth Amendment.

2. Whether the Tax Court abused its discretion in awarding damages to the Government under 26 U.S.C. 6673 when taxpayer petitioned Tax Court in good faith, pursuant to instructions of the Internal Revenue Deficiency Notice constitutes a violation of the Court to meet the "due process" guarantees of the Fifth Amendment.

3. Whether the United States Government through the Department of Treasury instituted descriminatory practices and procedures against individual church organizations by use of the taxing power to furnish support for "approved" religion constituted a violation of the "right to religious freedom" and the "Establishment Clause" claim of the FIRST AMENDMENT by the United States Constitution and 26 U.S.C. Secs. 6673?

LIST OF INTERESTED PARTIES

DONALD EDWARD FLYNN appearing in Propria Persona certifies that the following parties have an interest in the outcome of this case.

1. United States of America, represented by GLENN L. ARCHER, JR., Assistant Attorney General, MICHAEL L. PAUP, RICHARD W. PERKINS, and THOMAS A . GICK, Attorneys for Tax Division, Department of Justice, Washington, D. C. 20530
2. Commissioner of the Internal Revenue, Department of the Treasury, 15th Street and Pennsylavania Avenue, N.W., Washington, D.C. 20220.

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versus

COMMISSIONER OF INTERNAL REVENUE,

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ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion and judgment of the Court of Appeals, affirming the Tax Court's Judgment against the Petitioner appears in Appendix A to this petition. This decision is not reported. The Opinion and Order of the Tax Court appears in Appendix B. This Opinion is not reported.

JURISDICTION

The Sixth Circuit's Opinion and Judgment affirming the U.S. Tax Court's Judgment against the Petitioner, dated and entered December 9, 1985, is set forth in Appendix A. This Petition for Certiorari is being filed within ninety (90) days of entry of said judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

1. First Amendment to the Constitution of the United States Amendment I (1791).

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Fifth Amendment to the Constitution of the United States Amendment V (1791).

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject

for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On October 28, 1983, the Commissioner of Internal Revenue determined a deficiency in the federal income taxes of Donald Edward Flynn for the year 1981 in the amount of $12,114. The Commissioner also determined a negligence penalty under Sections 6653(a)(1) and 6653(a)(2) of the Internal Revenue Code of 1954 (26 U.S.C.) in the respective amounts of $605.70 and 50 percent of the interest due on $12,114. That on the notice of deficiency it clearly stated that taxpayer should petition tax court if he disagreed with the notice.

On January 16, 1984, Petitioner filed a petition in the United States Tax Court seeking a redetermination of the asserted deficiency and additions. Once the petition was filed the Internal Revenue resolved the dispute which established substantial justification for instituting the action and the dispute over tax deductions was resolved in favor of the taxpayer. Petitioner received a full refund check plus interest in tne amount of $5,226.88 and Petitioner filed a motion to withdraw his petition as the issue was moot. On October 15, 1984, the Internal Revenue Service objected to Petitioner's motion to withdraw and the Tax Court denied Petitioner's Motion to Withdraw.

On October 18, 1984, a trial was held. Joint Exhibit 1-A (Petitioner's tax return

signed under penalty of perjury by taxpayer for the year at issue with an attached copy of receipt from the local Universal Life Church) was submitted and admitted by the Tax Court. During the course of trail Petitioner introduced a witness who prepared his tax return (H & R Block) and she testified that in her professional opinion Petitioner's tax return was correct. The Trial Court also made certain remarks to Petitioner's witness of Petitioner's church concerning procedures and alluded to his church as a "purported Universal Life Church" and suggested that the witness read the Snodgrass case, a 1984 opinion of the United States Tax Court, which was unrelated to Petitioner.

On November 19, 1984, the Tax Court (Judge Swift) entered its order of dismissal and decision which determined a deficiency of $11,001 and additions to tax under Internal

Revenue Code Sections 6653(a)(1) and 6653(a)(2) in the respective amounts of $550.05 and 50 percent of the interest due on the $11,001 deficiency. The Tax Court also awarded the Government damages in the amount of $500 pursuant to Section 6673 of the Internal Revenue Code for bringing a frivolous lawsuit disregarding the fact that Petitioner had a valid dispute and that the dispute was settled by the Internal Revenue in his favor after he had petitioned Tax Court.

Petitioner, Donald E. Flynn, appealed to the United States Sixth Circuit Court of Appeals on December 19, 1984, by filing a timely notice of appeal, on the basis that the Tax Court abused its discretion in awarding damages to the Government under 26 U.S.C. 6673; that the standards employed for the disallowance of Petitioner's charitable contribution to the Universal Life Church

of Modesto, California, violated the Establishment Clause of the First Amendment; and that the Tax Court erred in affirming (with minor modification) the Commissioner's determination of deficiency and additions to tax under 26 U.S.C. 6653. The Sixth Circuit Court of Appeals affirmed the Tax Court Judgment. The appellate court found that the "petitioner" failed to produce competent evidence and that he nad in fact made the contribution pursuant to 803(6), Federal Rules of Evidence. Further, that because of that failure to produce evidence in support of his position (despite the fact that Petitioner's 1040 Tax Return signed under penalty of perjury with an attached supporting receipt of charitable deduction had been admitted into evidence) Petitioner's assertion was "groundless" under Section 6673 and the Tax Court did not abuse its

discretion in assessing damages. And finally, that Petitioner's claim that the Government violated the establishment Clause of the First Amendment in disallowing his charitable contributions deduction by favoring other churches over his church is premised on the fact that the donation claimed on his return was not proved that he in fact made any such donation. The court erred in failing to look to the fact that the Petitioner had filed his 1040 Income Tax Return for the year in question under penalty of perjury and that said tax return had a local receipt attached by a local chapter of the Universal Life Church and was indeed submitted and admitted into evidence before the Tax Court. Petitioner now seeks relief from this Honorable Court.

REASONS FOR GRANTING WRIT OF CERTIORARI

This case presents the most compelling reasons for allowing the writ. The Sixth Circuit Court of Appeals and the Tax Court, contrary to basic judicial procedure, have based their decisions on:

1. The contention that Petitioner failed to provide proof of his charitable contributions to the Universal Life Church in Modesto, California, was supported by the lower court statement, "Well, I'm not sure. I'm not sure I understand that exception or that argument.", when in fact the Respondent introduced into evidence Petitioner's 1040 Tax Return which was signed under penalty of perjury and had attached to it a local receipt that was "kept in the course of a regularly conducted business activity" which is admissable under Rule 803(6) of Federal Rules of Evidence as an exception

to the hearsay rule if supported by the testimony of the custodian of the records or another qualified witness. The Petitioner was in such a position when he signed his 1040 form under penalty of perjury and as the person who made the donation and his signature was his testimony, Bridger v Union Railway Co., 355 F2d 382, 392 (6th Cir 1966), and the Tax Court in granting a dismissal and imposing a "penalty" was in violation of due process under the Fifth Amendment to the Constitution as inordinate and unjustified.

Further, the Tax Court inflicted it's prejudice against Petitioner's church with its remarks to Petitioner's witness by referring to the church stating "Are you aware that it's in question?...Are you aware of the procedures of the Universal Life Church and practices in issuing receipts?..."

was violative of The First Amendment to the Constitution. That the Government in disallowing the deduction has favored other churches over his church and the courts show their prejudice against the Universal Life Church openly in Court.

Section 170(c) of the Internal Revenue Code of 1954, defines "charitable contribution as a gift to or for the use of...(2) A corporation, trust, or community chest, fund, or foundation." The term "charitable contribution" as used in section 170 IRC is synonymous with the word "gift". Fausner v Comm. 55 T.C. 620, 642 (1971). A gift is a transfer of property from the owner to another without consideration. Dejong v Comm. 36 T.C. 896, 899 (1961), aff'd 309 F.2d 373 (9th Cir. 1962). Once a charitable contribution is made the taxpayer has the burden of rebutting this presumption. Welch v Helvering, 290 U.S. 111,

115 (1933); Rockwell v Commissioner, 512 F.2d 882 (9th Cir.) cert.denied, 423 U.S. 1015 (1975). In the case before the bar, Petitioner did produce evidence in support of his issue pursuant to Rule 149(b), Rules of Practice of the United States Tax Court, his 1040 Tax Return, and testified to same by affixing his signature on said form under penalty of perjury. Said evidence was admitted into evidence by the Government. Once admitted the lower court should have looked to this testimony. Because Petitioner met his burden of proof, the burden of proof shifted to the Respondent therefore the Tax Court did abuse its discretion in dismissing his case.

Furthermore, Petitioner asserts that the United States Government through the Internal Revenue Service and Tax Court uses discriminatory practices and procedures

by it's use of the taxing power to furnish support for "approved" religious organizations and constitutes a violation of the "right to religious freedom" claim of the First Amendment of the Constitution. "The 'establishment of religion' clause of this amendment means that neither a state nor the Federal government can set up a church, nor can pass laws which aid one religion, aid all religions, or prefer one religion over another. Everson v Board of Ed. of Ewing Tp., N.J. 1947, 67 S.Ct. 504, 330 U.S. 1, 91 L.Ed. 711, 168 A.L.R. 1392, rehearing denied 67 S.Ct. 962, 330 U.S. 855, 91 L.Ed. 1297; People of State of Ill. ex rel. McCollum v Board of Ed. of School Dist. No. 71, Champaing County, Ill., Ill. 1948. 68 S.Ct. 461, 333 U.S. 203, 92 L.Ed. 648, 2 A.L.R. 2d 1338; Tudor v Board of Ed. of Borough of Rutherford, 1953, 100 A.2d 857, 14 N.J. 310,

45 A.L.R.2d 729, cert. den. 75 S.Ct. 25, 348 U.S. 816, 99 L.Ed. 644. This Honorable Court has said that religion clause problems must be decided on a case by case basis: "Each value judgment...must...turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." Walz v Tax Comm'n, 397 U.S. 644, 669 (1970). Petitioner asserts that the comments of the Tax Court and the obvious prejudice of the I.R.S. toward his church interfered with the religious practices of the Universal Life Church. That the comments made by the Tax Court constitutes a "veto [power] of [a] religious decision," and an "anathema to the Religion Clauses." Petition for Certiorari at 22, United States v Moon, 718 F.2d 1210 (2d Cir. 1983), cert. den., 104 S.Ct. 2344 (1984). Focusing on

principles of church autonomy, the First Amendment prevents the I.R.S. and the Tax Court from second-guessing the religious intent of donor church members.

In broad terms, Petitioner poses two questions: 1) who decides what activities constitute legitimate religious uses -- the I.R.S. or the particular church, and 2) does it violate traditional notions of free exercise protection to allow the I.R.S. to decide?

The First Amendment proclaims: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." For over two hundred years, neither Congress nor the Supreme Court has offered a definition of "religion" or "church," D. Kelley, Why Churches Should Not Pay Taxes, 62 (1977). Rather than attempt a definition, the scope of religious protection has turned

on the inclusion or exclusion of specific claims. Historically, the amendment breaks down into two components: (1) the Establishment Clause and (2) the Free Exercise Clause. Although this breakdown is convenient for analytical purposes, an internal tension exists between the two clauses: "may a government remove burdens from, grant benefits to, or make accommodations for the free exercise of religion without simultaneously promoting the establishment of a religion?" Note, Constitutional Law: The Religion Clauses --A Free Rein to Free Exercise?, 11 Stetson L.Rev. 386, 388 (1982). The Establishment Clause limits permissible governmental support for church conducted activities. Its main objective, as construed by this Honorable Court in Lemon v Kurtzman, 403 U.S. 602 (1971), "is to prevent...the intrusion of [either state or religious institution]

into the precincts of the other...Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." Undeniably, taxation and tax exemption implicate governmental intrusion or support of religion. See Walz v Tax Comm'n, 397 U.S. 644, 672-73 (1970) which upheld the tax exempt status of properties used solely for religious worship.

In Thomas v Review Board, 450 U.S. 707 (1981) this Honorable Court held that the denial of unemployment benefits imposed an indirect burden on free exercise rights: "Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion [citations omitted]. The determination of what is "religious" belief or

practice is more often than not a difficult and delicate task...However, the resolution of that question is not to turn upon a judicial preception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment Protection." Thomas may be viewed as the highpoint of free exercise protection for indirect burdens on religious practices. One year later, this Honorable Court in United States v Lee, 455 U.S. 252 (1982), erroneously refused to expand this First Amendment protection to encompass the payments of taxes.

In United States v Lee, Supra, the government's need to collect revenues it was held justified a limitation on religious freedom. This governmental interest has been a formidable opponent to religion clause challenges in the past. In a series of

cases, the tax court systematically denied tax exempt status to "religious" organizations when tne church in question served the private purposes of the minister. See Unitary Mission Church of Long Island v Commissioner, 74 T.C. 507 (1980); Southern Church of Universal Bhd. Assembled, Inc., v Commissioner, 74 T.C. 1223 (1980); Bubbling Well Church of Universal Love, Inc., v Commissioner, 74 T.C. 531 (1980). These cases represent private tax avoidance schemes. But unlike Universal Life Church which has it's tax exempt status, the organizations in question were not bona fide religions. In reaching its conclusion in the Lee case this Honorable Court applied the Thomas balancing formula: "Not all burdens on religion are unconstitutional...The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding

governmental interest." The Lee Court overrode the Constitution in order to maintain an ineffective social security system against the Amish's bona fide beliefs, and exacted the tax despite their sincerity. The Court concluded that "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax." Thomas, Supra, at 260.

The decision in Lee exemplifies the Court's recent use of the traditional balancing test to allow an infringement on religious freedom. Clearly, this Honorable Court considers the Internal Revenue Code as a limitation on even sincere religious beliefs.

Further, the grant of a tax exemption and the discriminatory practices and procedures of the I.R.S. against "unapproved" churches

creates an involvement between church and government through taxation of churches. Indeed, the present actions of the I.R.S. and the statements made by the Tax Court violate the Establishment Clause by fostering excessive entanglement between government and religion and gives significant aid to "approved" religious enterprises. Thus when specific churches are given tax exemptions they are, in effect, given financial subsidies and the Court may well be prepared to hold that such action constitutes a breakdown of the separation of church and state, and is but the foot in the door leading to an establishment of government "approved" churches. "Any type of statutory exemption from taxation that discriminates between types of religious belief on the basis of the content of such belief would offend both the federal and state constitutional

provisions guaranteeing a separation of church and state." Fellowship of Humanity v Alameda County, 315 F.2d 394, 153 C.A.2d 673 (1957). "The purpose of the framers of federal and state constitutional provisions separating church and state and guaranteeing 'religious liberty' was to obtain relief from laws making almost every deviation from established practice or faith a crime, and not to secure the right, under the guise of religious freedom, to jeopardize the safety, health or welfare of their fellowman. Lawson v Commonwealth, 164 S.W. 2d 972, 291 KY. 437, (1942). Busey v District of Columbia, 1943, 138 F2d 592, 78 US App DC 189, conforming to mandate 63 S.Ct. 1277, 319 US 579, 87 L Ed 1598. The Tax Court clearly abused its descretion and erred when it failed to look to Taxpayer's 1040 Tax Return

admitted into evidence with Petitioner's affidavit signed under penalty of perjury testifying to the facts of said form. Evidence in support of an issue of fact clearly placed the burden of proof back into play and squarely upon the Government.

The Tax Court further erred when it placed a penalty upon the Petitioner for filing a frivolous lawsuit. If the Government can, in its instructions, request a taxpayer who disputes their assessments to petition tax court and omits to warn the taxpayer that by doing so he will be fined a frivolous penalty at the descretion of the I.R.S.; this leaves the taxpayer in a precarious position. In the case before the bar, Petitioner brought a legitimate suit. He even prevailed, which was clearly shown when the I.R.S. redetermined his tax liability in his favor. Upon the actions of the I.R.S.

I.R.S. the Petitioner tried to withdraw his suit and the Government and Tax Court would not allow him to do so and then turned around and claimed that his suit was frivolous. This is a complete contradiction of justice and a clear denial of Petitioner's right to due process.

CONCLUSION

For all the foregoing reasons, it is submitted that this Petition for Writ of Certiorari should be granted, thereby allowing the Court to fulfill the "due Process" guarantees of the Fifth Amendment and separation of church and state and establishment clause of the First Amendment.

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PROOF OF SERVICE

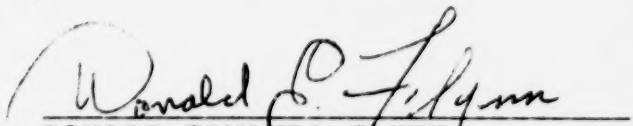
I, Donald E. Flynn, Petitioner in Propria Persona herein, hereby certify that on the 9th day of March, 1986, I served three (3) copies of the foregoing Petition for Writ of Certiorari on all the parties required to be served under Rule 28 of the Rules of the United States Supreme Court, as follows:

1. United States of America, represented by GLENN L. ARCHER, JR., Assistant Attorney General, MICHAEL L. PAUP, RICHARD W. PERKINS, and THOMAS A .GICK, Attorneys for Tax Division, Department of Justice, Washington,D. C. 20530

2. Commissioner of the Internal Revenue, Department of the Treasury, 15th Street and Pennsylavania Avenue, N.W., Washington, D.C. 20220.

by depositing same in United States Post Office with first class postage prepaid

and that forty copies were deposited in a United States Post Office with first class postage prepaid and properly addressed to The Clerk of the Supreme Court of the United States, Supreme Court Building, One First Street, N.E. Washington, D.C. 20543.



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APPENDIX "A"

DONALD EDWARD FLYNN,

Petitioner-Appellant,

-v-

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Sixth Circuit

No. 85-1003

Appeal from the United States Tax Court.

Petitioner is appealing from an order of the Tax Court affirming (in substantial part) a notice of deficiency and additions to tax issued by the Commissioner, and from the Tax Court's decision to award damages to the Government under 26 U.S.C. 6673. The appeal has been referred to a panel of the Court under Rule 9(a), rules of the Sixth Circuit. Upon consideration of the briefs and record, this panel agrees unanimously that oral argument is not needed. Rule

34(a), Federal Rules of Appellate Procedure.

The record shows that the Commissioner of Internal Revenue determined a deficiency in the federal income taxes of petitioner Donald Edward Flynn for the year 1981 in the amount of $12,114. The Commissioner also determined additions to such taxes under 26 U.S.C. 6653(a)(1) and (a)(2) in the respective amounts of $605.70 and 50 percent of the interest due on $12,114. Petitioner on January 16, 1984, filed a petition in the Tax court seeking a redetermination of the asserted deficiency and additions. On November 19, 1984, the Tax Court entered its order of dismissal and decision which determined a deficiency of $11,001 and additions to tax under 26 U.S.C. 6653(a)(1) and (a)(2) in the respective amounts of $550.05 and 50 percent of the interest due on the $11,001 deficiency. The

Tax Court also awarded the Government damages in the amount of $500 pursuant to 26 U.S.C. 6673.

This appeal followed.

Petitioner's contentions on appeal are basically threefold:

1. That the Tax Court erred in affirming (with minor modification) the Commissioner's determination of deficiency and additions to tax under 26 U.S.C. 6653;

2. That the Tax court abused its discretion in awarding damages to the Government under 26 U.S.C. 6673;

3. That the disallowance of petitioner's charitable contribution to the Universal Life Church of Modesto, california, violated the Establishment

Clause of the First Amendment.

In this case, the Commissioner issued Petitioner a statutory notice of deficiency for the year 1981, fully disallowing a claimed charitable contribution deduction of $25,000. Petitioner claimed that he made the disputed contribution to the Universal Life Church of Modesto, California, and as such, was entitled to deduct the amount in dispute pursuant to 26 U.S.C. 170. At trial, however, petitioner failed to produce competent evidence that he had in fact made the contribution. He attempted to enter into evidence a letter from the Universal Life Church acknowledging a contribution of $25,000. The trial court refused to admit the evidence under Rule 803(6), Federal Rules of Evidence ("business record" exception to the hearsay rule).

The Federal rules of Evidence are applicable to trials in the United States Court.

Rule 143(a), Rules of Practice of the United States Tax Court. Rule 803(6), Federal rules of Evidence, provides that records "kept in the course of a regularly conducted business activity" are admissible as an exception to the hearsay rule if supported by the testimony of the custodian of the records or another qualified witness. Under this Court's decision in Bridger v. Union Railway Co., 355 F.2d 382, 392 (6th Cir. 1966), the actual keeper of the record need not testify, but some person "in a position to attest to its authenticity" must appear.

In a tax Court proceeding, a deficiency asserted with respect to a charitable contribution deduction is deemed to be presumptively correct; the taxpayer has the burden of rebutting this presumption. Welch v. Helvering, 290 U.S. 111, 115 (1933); rockwell v. Commissioner, 512 F.2d 882, 885 (9th Cir.), cert.

denied, 423 U.S. 1015 (1975). In the present case, petitioner did not produce a recordkeeper or other qualified witness to authenticate the letter he wished to offer into evidence. Under Rule 149(b), rules of Practice of the United States Tax Court, failure to produce evidence in support of an issue of fact as to which a party has the burden of proof may be grounds for dismissal. Because petitioner failed to substantiate his claim, the Tax Court did not abuse its discretion in dismissing his case. See Montogomery v. commissioner, 367 F2d 917, 919 (9th Cir. 1966); Watson v. commissioner, 690 f.2d 632, 635 (9th cir. 1984); Funk v. Commissioner, 687 F.2d, 266 (8th Cir. 1982). such assessments are made for negligence of intentional disregard of rules and regulations with respect to income taxes. Again, petitioner presented only an unauthenticated

letter from the Universal Life Church to substantiate the disputed deduction. He therefore failed to rebut the presumption of correctness attached to additions of tax under Section 6653. Therefore, it appears the Tax Court correctly dismissed petitioner's challenge to the Commissioner's decision.

Petitioner's second challenge goes to the Tax Court's decision to award damages to the Government under 26 U.S.C. 6673. That section grants the Tax Court discretion to assess damages for assertion of a frivolous or groundless claim. Crain v. Commissioner, 737 F.2d 1417 (5th Cir. 1984). In this case, even though a full trial was held on the charitable contributions deduction, petitioner completely failed to provide any evidence in support of his position on this issue. Therefore, petitioner's assertion was "groundless" under Section

6673 and the Tax Court did not abuse its discretion in assessing damages.

Petitioner's last claim is that the Government violated the Establishment Clause of the First Amendment in disallowing his claimed charitable contributions deduction. Specifically, petitioner claims that in disallowing the deduction the Government has favored other churches over his church. Petitioner's Establishment Clause claim is premised on the fact that the donation claimed on his return was in fact made. The record conclusively demonstrates, however, that petitioner failed to prove that he in fact made any such donation. Therefore, since the underlying premise of petitioner's Establishment Clause claim is faulty, that claim must fail.

It appears that the questions on which decision of this cause depends are so

unsubstantial as not to need further argument. Rule 9(d)(3), Rules of the Sixth Circuit.

It is therefore ORDERED that the decision of the Tax Court be and it hereby is affirmed.

AFFIRMED.

APPENDIX "B"

UNITED STATES TAX COURT

WASHINGTON, D.C. 20217

DONALD EDWARD FLYNN,

Petitioner,

-v- Docket No. 1263-84

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER OF DISMISSAL AND DECISION

This case was recalled from the calendar for the Trail Session of the Court at Detroit, Michigan on October 18, 1984 for trail. Petitioner appeared and was heard. Counsel for respondent appeared and filed with the Court a motion for damages pursuant to Section 6673 of the Internal Revenue Code of 1954, as amended. Upon the Court's own motion and for cause appearing in the transcript of the proceedings, it is

ORDERED that this case is dismissed pursuant to Rules 123 and 149(b), Tax Court Rules of Practice and Procedure, by reason of petitioner's failure to properly prosecute the case and to produce evidence in support of the claimed charitable deductions. It is further,

ORDERED and DECIDED that there is a deficiency in income tax due from petitioner for the taxable year 1981 in the amount of $11,001.00 and additions to tax pursuant to Sections 6653(a)(1) and 6653(a)(2) of the Internal Revenue Code of 1954, as amended, in the amount of $550.05 and 50% of the interest due on the deficiency of $11,001.00, respectively. It is further,

ORDERED that respondent's motion for damages pursuant to Section 6673 of the Internal Revenue Code of 1954, as amended,

is granted in that damages are awarded in the amount of $500.00.

(Signed) Stephen J. Swift

Judge

Entered: November 19, 1984